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ISSUES RELATED TO COMPETITION LAW OF PARTICULAR RELEVANCE TO DEVELOPMENT

Note by the UNCTAD secretariat

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I. INTRODUCTION

1. The "Partnership for Growth and Development" adopted by UNCTAD IX, in analysing the "challenges arising from globalization and liberalization among countries facing different circumstances", recognized that: "Competition policy is one important new policy area. There is growing realization that anti-competitive practices can have a negative influence on trade opportunities arising from trade concessions and obligations. The challenge faced by developed and developing countries alike is to introduce effective national policies in this respect. At the same time this issue may be considered at the international level. The TRIMs Agreement has formally recognized that competition policy and investment policy are closely related and thus require parallel consideration. Relevant to this consideration is the work carried out in UNCTAD on restrictive business practices (RBPs). The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of RBPs is the only multilateral instrument on the importance of competition principles" (TD/377, para. 29).

2. Moreover, in part II of the same text on "The contribution of UNCTAD to sustainable development", UNCTAD IX decided that UNCTAD's work on "international trade in goods and services, and commodity issues", to be undertaken in cooperation with WTO and other relevant international organizations, will focus, *inter alia*, on:

> "Examining issues related to competition law of particular relevance to development: continuing analytical work on restrictive business practices; assisting [developing countries, particularly least developed countries and certain developing countries with structurally weak and vulnerable economies, and economies in transition] to formulate competition policies and legislation; institution-building; focusing on Africa by holding a regional meeting, creating relevant inventories and data bases, and establishing a technical cooperation programme;" (TD/377, para. 91 (iii)).

3. In addition, with respect to technical cooperation, UNCTAD IX decided that work on international trade in goods and services, and commodity issues, should focus, *inter alia* on : "Supporting strategies in promoting national competition and consumer protection law and policy formulation" (TD/377, para. 97 (ii)).

4. Finally, with respect to UNCTAD's intergovernmental machinery, UNCTAD IX decided that the Commission on Investment, Technology and Related Financial Issues will, *inter alia*, deal with the area defined in paragraph 91 (iii), i.e. competition.

5. In turn, the Trade and Development Board, at its thirteenth executive session, in adopting the draft provisional agenda for the first session of the Commission submitted by the President of the Board,[1] decided that agenda item 4 of the Commission on Investment, Technology and

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[1] Follow-up to the recommendations adopted by the Conference at its ninth session (TD/B/EX(13)/L.2).

Related Financial Issues would read: "Issues related to competition law of particular relevance to development"; and that under that agenda item, "the Commission will focus on examining issues related to the subject: continuing analytical work on restrictive business practices and assistance in formulating competition policies and legislation. To facilitate the discussion, experts will prepare a report."

6. The Expert Meeting on Competition Law and Policy, meeting on 13-15 November 1996 (the week just before the first meeting of the Commission (18-22 November 1996)), will submit its report to the Commission.

II. BACKGROUND RELATING TO UNCTAD's WORK ON RESTRICTIVE BUSINESS PRACTICES

7. It should be recalled that UNCTAD has been active in the field of competition and restrictive business practices since the early 1970s. Work in this area culminated in the adoption, by the General Assembly in its resolution 35/63 of 5 December 1980, of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. To date, as recalled by UNCTAD IX in the Midrand Declaration, the Set is the only multilateral instrument on competition in existence. However, it is in the form of a recommendation to States, and hence, is non-binding in nature.

8. In implementation of the Set, and in particular of its section G devoted to international institutional machinery, an "Intergovernmental Group of Experts on Restrictive Business Practices operating within the framework of a Committee of UNCTAD" was established in 1981 and has held 14 sessions since. Moreover, the Set provided for a review procedure, whereby "subject to the approval of the General Assembly, five years after the adoption of the Set of Principles and Rules, a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules" (section G, para. 6, of the Set). Pursuant to this review procedure contained in the Set, a first Review Conference took place in 1985, which was followed, subsequently, by the Second Review Conference in 1990 and the Third Review Conference on 13-21 November 1995. At its closing meeting, on 21 November 1995, the Third Review Conference adopted a resolution, which is contained in annex I to its report.[2]

9. In its resolution, the Third Review Conference established a detailed programme of work in the field of competition law and policy, in particular with respect to technical cooperation and assistance for developing countries and countries in transition, studies and consultations to clarify common ground in this area. Moreover, the Review Conference affirmed the fundamental role of competition law and policy for sound economic development and recommended the continuation of the important and useful work programme within UNCTAD's intergovernmental

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[2] Report of the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF.4/15).

machinery that addresses competition law and policy issues and proceeds with the active support and participation of competition law and policy authorities of member countries. It also recommended to the United Nations General Assembly to change the title of the IGE on Restrictive Business Practices to that of Intergovernmental Group of Experts on Competition Law and Policy; and further recommended that the General Assembly convene a Fourth United Nations Conference on the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, to be held in Geneva, under UNCTAD auspices, in the year 2000.

10. Pursuant to this resolution, and taking into account the Midrand Declaration, a draft resolution has been under consideration by the General Assembly. At the time of writing, no decision has been taken by the General Assembly in this respect.

III. CONTINUING ANALYTICAL WORK ON RESTRICTIVE BUSINESS PRACTICES AND ASSISTANCE IN FORMULATING COMPETITION POLICIES AND LEGISLATION: CONCLUSIONS AND SUGGESTIONS FOR ACTION

11. As can be seen from the above, ongoing work in the area of competition law and policy involves analytical work on restrictive business practices and assisting countries in formulating competition policies and legislation, as well as other technical cooperation activities.

12. Work currently under way by the secretariat at the request of the Review Conference includes revisions of a number of analytical documents in the light of comments by member States. These are (i) a study on "The role of competition policy in economic reforms in developing and other countries" (TD/RBP/CONF.4/2); (ii) a note on "Selected cases of restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4/6); (iii) a feasibility study on developing a bibliography and database facility on RBPs (TD/RBP/CONF.4/7); (iv) a study on "The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries" (TD/RBP/CONF.4/8), and (v) a note on "Basic objectives and provisions of competition laws" (UNCTAD/ITD/15).

13. In addition, the UNCTAD secretariat has prepared the draft outline of a study on "Empirical evidence of the benefits (including benefits for consumers) to be gained by developing and least developed countries and countries in transition from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development", as requested by the Review Conference; this outline is being submitted to the Expert Meeting on Competition Law and Policy. As decided in paragraph 11 of the resolution adopted by the Conference, future analytical work may, upon request by member States, cover a large range of issues. Further analytical work will be pursued in the context of informal multilateral consultations among experts participating in the Expert Meeting on Competition Law and Policy.

14. In the area of technical cooperation, the UNCTAD secretariat has prepared, for the Expert Meeting on Competition Law and Policy, a progress report reviewing technical cooperation activities undertaken by UNCTAD and other international organizations, as well as States bilaterally, with a view to strengthening its ability to provide technical assistance for capacity-building in the area of competition law and policy. In its report to the Commission, the Expert Meeting will indicate progress made on the analytical work underway, as well as on technical cooperation programmes, including the focus on technical cooperation activities for Africa, as requested in the Midrand Declaration.

15. Accordingly, the Commission may wish to:

(a) Take note of the Expert Meeting's report to the Commission and endorse the work being done by UNCTAD in this area;

(b) Decide that a further Expert Meeting on Competition Law and Policy will be held in 1997;

(c) Request that priority be given to the analysis of certain areas (or aspects of certain areas) of competition law and policy;

(d) Express support for the technical cooperation activities being undertaken by UNCTAD and call for further resources to be provided for such activities.